# STATE OF MICHIGAN

# COURT OF APPEALS

BERLIN CHARTER TOWNSHIP,

Plaintiff/Counter-Defendant/Appellant,

v

PATRICIA A. PROUD d/b/a THE BRASS SWAN COMPANY,

Defendant/Counter-Plaintiff/Appellee.

UNPUBLISHED
February 26, 2004

No. 242947
Monroe Circuit Court
LC No. 95-3886-CH

Before: Donofrio, P.J., and Griffin and Jansen, JJ.

PER CURIAM.

Plaintiff/counter-defendant Berlin Charter Township ("the township") appeals by leave granted an order denying the township's motion for summary disposition as to the township. The trial court granted the township's motion for summary disposition as to the township trustees and denied defendant/counter-plaintiff Patricia Proud's motion for summary disposition on her claim of a constitutional tort avoiding governmental immunity. On appeal, the township argues that Proud's constitutional claims must fail because the ordinance at issue is content neutral, is narrowly tailored to meet a governmental interest and does not deprive Proud of reasonable alternative avenues of communication. Also, the township argues that principles of governmental immunity preclude Proud's remaining tort claims. We agree, and reverse.

The township enacted an ordinance regulating the operation of adult entertainment businesses in the township. This case arises out of Proud's counter-complaint against the township and the township's trustees after the circuit court imposed a preliminary injunction enjoining her from operating a "topless bar" in violation of the adult entertainment ordinance. Proud's counterclaim contains the following counts: (I) the deprivation of civil rights pursuant to 42 USC § 1983; (II) a conspiracy by the trustees to commit that civil rights violation; (III) the trustees' failure to prevent that civil rights violation; (IV) the violation of free speech under the state constitution; (V) intentional interference with business relations; (VI) intentional infliction of emotional distress; and (VII) conspiracy. In Count VIII, Proud requested punitive damages.

The parties filed cross-motions for summary disposition. The circuit court denied Proud's motion for summary judgment. The court granted in part the township's motion when it dismissed the trustees as being immune from suit when acting in furtherance of legislative duties.

The court ruled that the trustees had been engaged in a discretionary, policymaking decision and as such were immune from suit. As to the township, however, the circuit court denied its motion of summary disposition ruling that,

> The threshold issue in Proud's civil conspiracy theory against the Township concerns whether the Township was involved in a proper exercise and discharge of a governmental function. MCL 691.1407. In *Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992), the Michigan Court of Appeals enumerated among the elements amounting to civil conspiracy, "to accomplish a lawful purpose by criminal or unlawful means." And in *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 591; 363 NW2d 641 (1984), found (sic) that governmental agencies' ultra vires activities were not entitled to governmental immunity under MCR 2.116(C)(7).
>
> Proud has pled the Township had utilized State Police and Liquor Control to investigate her establishment in furtherance of an alleged conspiracy to put her out of business. While the Court is presently hesitant to grant the Township's motion for summary judgment, Proud will need to come forward with evidence toward the issue of conspiracy and demonstrate something in the way of unlawful conduct on the part of the Township outside the Township's proper exercise of police powers. Essentially, there needs to be a showing of Township acts independent of authorized legislative function in furtherance of a conspiracy to put Proud out of business.

The circuit court's order dismissed the suit against the trustees, denied both the township's and Proud's motions for summary disposition and dismissed Proud's claim for punitive damages. It is from this order that the township appeals.

On appeal, the township argues that the trial court erred when it denied its motion for summary disposition because the township's adult entertainment ordinance is content-neutral, narrowly drawn to achieve a legitimate governmental objective, allows reasonable alternative avenues of communication, and therefore does not violate Proud's constitutional rights and accordingly her claim for damages must fail. Proud counters that the ordinance restricts her protected speech and impermissibly infringes on constitutionally protected activity under the First Amendment and Article 1, § 5 of our state constitution. Proud alleges that the ordinance is unconstitutional because it was enacted solely "to harass Proud and regulate the content of her business establishment" and as a result, the township is not entitled to summary disposition.

We review de novo a trial court's ruling on a motion for summary disposition as well as its resolution of any constitutional issues raised. *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 582; 640 NW2d 321 (2001). As articulated by this Court in *Van Buren Twp v Garter Belt Inc*, 258 Mich App 594, 608-609; 673 NW2d 111 (2003):

> Statutes and ordinances are presumed to be constitutional and the burden of proving otherwise rests with the challenger. *Gora v Ferndale*, 456 Mich 704, 711-712; 576 NW2d 141 (1998); *People v Boomer*, 250 Mich App 534, 538; 655 NW2d 255 (2002). Further, we must construe a statute or ordinance as constitutional unless its unconstitutionality is clearly apparent. *Owosso v*

*Pouillon*, 254 Mich App 210, 213; 657 NW2d 538 (2002); *People v Barton*, 253 Mich App 601, 603; 659 NW2d 654 (2002).

Further, "MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties." *Glancy v Roseville*s, 457 Mich 580, 583; 577 NW2d 897 (1998). When deciding a motion for summary disposition under MCR 2.116(C)(7) or (10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

In *Jott, Inc v Charter Twp of Clinton*, 224 Mich App 513, 526-527; 569 NW2d 841 (1997), this Court recognized that:

> Nonobscene, erotic entertainment, such as topless dancing, is a form of protected expression under the First Amendment, but enjoys less protection than other forms of First Amendment expression, such as political speech. *Barnes v Glen Theatre, Inc*, 501 US 560, 565-566; 111 S Ct 2456, 2460; 115 L Ed 2d 504 (1991); *Woodall v El Paso*, 49 F 3d 1120, 1122 (CA 5, 1995); *Christy v City of Ann Arbor*, 824 F 2d 489, 492 (CA 6, 1987).
>
> The use of zoning and licensing ordinances to regulate exhibitions of 'adult entertainment' is widely recognized. *Young v American Mini Theatres, Inc*, 427 US 50; 96 S Ct 2440; 49 L Ed 2d 310 (1976); *Ferndale v Ealand (On Remand)*, 92 Mich App 88, 92; 286 NW2d 688 (1979). As the United States Supreme Court stated in *Young, supra* at 62; 96 S Ct at 2448:
>
> 'The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not sufficient reason for invalidating these ordinances.'

The *Jott* Court also set forth the following standard for reviewing the constitutionality of ordinances such as the one at issue in the present case as dictated by the United States Supreme Court.

> An ordinance that does not suppress protected forms of sexual expression, but which is designed to combat the undesirable secondary effects of businesses that purvey such activity, is to be reviewed under the standards applicable to content-neutral time, place, and manner regulations. *Renton v Playtime Theatres, Inc*, 475 US 41, 49; 106 S Ct 925, 930; 89 L Ed 2d 29 (1986). Content-neutral time, place, and manner regulations are acceptable as long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication. *Id*. at 47. [*Jott, supra*, 224 Mich App 527.]

Like the ordinance in *Jott*, the ordinance here by its terms does not ban topless dancing, but, rather, merely restricts the location of such forms of adult entertainment. In *Jott*, the aim of the ordinance was not to suppress such activity, "but to combat the secondary effects of adult uses on surrounding areas 'in order to insure that the surrounding areas will not experience

deleterious, blighting or downgrading influences.'" *Jott, supra,* 224 Mich App 527. Here, the purpose of the ordinance is almost exact,

> The Township Board of Berlin Charter Township recognizes and concludes that the activity of 'adult entertainment' . . . is an activity which, because of its nature, is known to have seriously objectionable operational characteristics, and thus is an activity which has a deleterious effect on adjacent areas and unless properly regulated would result in the destruction of neighboring property values and a threat to the public health, safety and welfare of the persons in Berlin Charter Township. Accordingly, it is the intent and purpose of the Berlin Charter Township Board to adopt reasonable regulations for adult entertainment businesses in the Township, so as to minimize the injury caused by this activity on the public health, safety, and welfare on the persons and property with the Township.

The Court found in *Jott*, that "the ordinance may be viewed as a content-neutral time, place, and manner restriction on expressive conduct." *Jott, supra,* 224 Mich App 527, citing *Renton, supra,* 475 US 48-49. Applying *Jott,* because of the similarity between the ordinance at issue here and the *Jott* ordinance we find the ordinance is "a content-neutral time, place, and manner restriction on expressive conduct." *Id*.

Pursuant to the analysis in *Jott*, the next step is to "determine whether the ordinance is designed to serve a substantial governmental interest and whether it allows for reasonable alternative avenues of communication." *Jott, supra,* 224 Mich App 527. The *Jott* Court points out that,

> [i]n *Renton, supra*, a city ordinance prohibited any adult motion picture theater from locating within one thousand feet of any residential zone, single- or multiple-family dwelling, church, or park and within one mile of any school. The Supreme Court found that the ordinance was designed to serve a substantial governmental interest 'because a city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect.' [*Renton, supra*] at 50, quoting *Young, supra* at 71. [*Jott, supra,* 224 Mich App 528.]

As was the case in *Jott*, the same interest is at stake here. The ordinance expressly identifies the objective of protecting neighborhoods from the "deleterious effect on adjacent areas . . . [and] . . . the destruction of neighboring property values" from adult uses, as well as a "a threat to the public health, safety and welfare" to the community. Following *Jott*, we conclude that the ordinance at issue is adequately tailored to meet the particular objective. The ordinance prohibits adult businesses from locating within one thousand feet of each other in order to lessen the harmful effects caused by multiple adult uses in a certain area. *Jott, supra,* 224 Mich App 528.

We also reject Proud's claim that the ordinance is unconstitutional because it fails to allow for reasonable alternative avenues of communication. "Although a trial court's ruling on a constitutional challenge to a zoning ordinance is reviewed de novo, this Court accords considerable deference to the trial court's factual findings, and those findings will not be disturbed unless we would have reached a different result had we occupied the trial court's

position." *Jott, supra*, 224 Mich App 525-526, citing *Guy v Brandon Twp*, 181 Mich App 775, 778-779; 450 NW2d 279 (1989).

Here, the trial court held evidentiary hearings and, with attorneys for each of the parties present, also physically visited and inspected the premises indicated by the township as suitable alternative sites. "Because each city presents its own unique set of circumstances, 'each case must be decided according to its specific facts.'" *Jott, supra*, 224 Mich App 533 citing *Christy, supra*, 824 F 2d 491. The trial court then found on the record as a finding of fact that there were sufficient alternative sites, and held that Proud did not establish that the township had no available alternative sites. Like *Jott, supra*, the trial court examined the individual characteristics of Berlin Township and determined that the ordinance does not unreasonably limit alternative avenues of communication. According the trial court "considerable deference," and after reviewing the lower court record, we will not disturb the factual findings of the trial court because there is no evidence in the lower court record to lead us to the opposite conclusion.

The township is entitled to summary disposition because the township's adult entertainment ordinance is content-neutral, narrowly drawn to achieve a legitimate governmental objective, and allows reasonable alternative avenues of communication and therefore does not violate Proud's constitutional rights.

Next, the township argues it is entitled to summary disposition because governmental immunity is applicable because the township did not violate Proud's constitutional rights. The applicability of governmental immunity is a question of law reviewed de novo on appeal. *Baker v Waste Mgt of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995). Also, the decision to grant or deny a motion for summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118-119; 597 NW2d 817 (1999). We review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998); *Michigan Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 114-115; 617 NW2d 725 (2000).

The crux of Proud's argument is that the township is not entitled to summary disposition because governmental immunity is not applicable because the township violated Proud's constitutional rights. Because the ordinance is constitutional, Proud's constitutional rights have not been violated by the enactment of the ordinance, there is no tort and this issue is moot. We will note however that the determination of whether an activity was a governmental function must focus on the general activity and not the specific conduct involved at the time of the tort. *Tate v Grand Rapids*, 256 Mich App 656, 661; 671 NW2d 84 (2003). Because the township's adult entertainment ordinance is content-neutral, narrowly drawn to achieve a legitimate governmental objective, and allows reasonable alternative avenues of communication, clearly there was "some constitutional, statutory, or other legal basis" for the township's enactment of the ordinance and governmental immunity would apply in the absence of mootness. *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 253; 393 NW2d 847 (1986).

Finally, the township argues that even aside from the application of governmental immunity, the township should be granted summary disposition for the reason that Proud cannot establish the elements of conspiracy. Proud correctly argues that this issue should not be considered by this Court since the township raised it for the first time on appeal. The trial court stated as part of its opinion that "Proud will need to come forward with evidence toward the

issue of conspiracy and demonstrate something in the way of unlawful conduct on the part of the Township outside the Township's proper police powers. Essentially, there needs to be a showing of Township acts independent of authorized legislative function in furtherance of a conspiracy to put Proud out of business." Apparently the township interpreted this to mean Proud needed to prove the elements of an intentional tort in order to prevail and argued on appeal that Proud cannot prove the elements of the intentional tort of conspiracy. We will not reach this issue in any event, not only because it was not properly preserved, but because summary disposition is appropriate by the operation of the previous two issues, *supra*.

Reversed.

/s/ Pat M. Donofrio
/s/ Richard Allen Griffin
/s/ Kathleen Jansen